IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 413

STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER,

Petitioners,

vs.

CLIFTON A. PEARCE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Question Presented

Whether an increased sentence after retrial when the initial conviction and sentence are invalid due to a constitutional error at the original trial offends the Due Process and Equal Protection Clauses of the fourteenth amendment and the Double Jeopardy Clause of the fifth amendment?

Summary of the Argument

An increased sentence after retrial when the initial conviction and sentence are invalid due to a constitutional error at the original trial offends the Due Process and Equal Protection Clauses of the fourteenth amendment and the Double Jeopardy Clause of the fifth amendment.

A. Increased Sentence Affects Both Release and Parole.

An increased sentence on retrial means additional imprisonment for a successful petitioner, since the increased sentence has the effect of postponing a defendant's actual release date. The defendant is also required to serve again the minimum period required in order to become eligible for parole.

B. Traditional Theories Justifying Harsher Sentences.

Increased sentences are normally justified on the grounds that the first trial is a nullity and the sentence imposed places no limitations upon the sentence at the second trial or that the defendant by seeking a new trial has waived any benefit he might have received under his prior sentence. Application of these theories has been tempered in North Carolina by the requirement that time served under the invalid sentence be credited to the second sentence. Nevertheless, an increased sentence is still possible in North Carolina since the second sentence can be for a longer term than the first sentence.

C. Possibility of an Increased Sentence Is a Reality to Successful Petitioners.

Under one survey, seventy percent of those defendants who were retried after successful attack on their original convictions were given increased sentences. The threat of harsher sentences has the effect of deterring defendants from seeking correction of errors in their original trials.

D. Due Process Is Offended by Restrictions Placed on Defendant's Access to Post-Conviction Relief.

The threat of harsher sentencing places an unconstitutional condition on the exercise of the defendant's constitutional rights. The state requires that the defendant waive his immunity from an increased sentence in order to seek his right to fair trial. This threat of a harsher sentence impairs the defendant's access to existing post-conviction remedies. A defendant unable to assert his constitutional rights is denied due process. It is fundamentally unfair to provide post-conviction relief and then to restrict its use.

E. Arbitrary Classification of Persons Exposed to Harsher Sentences Denies Equal Protection.

The class of persons exposed to the risk of harsher sentences includes only those defendants who successfully seek post-conviction relief. Equal protection is denied since there is no reason to believe that this group of successful petitioners deserve an upward revision of their sentences anymore than those who were not exposed to the risk.

F. Double Jeopardy Protections Against Multiple Punishments and Reprosecution After Acquittal Are Violated by Increased Sentences.

A harsher sentence on retrial subjects a defendant to double punishment for the same offense, which is prohibited under the Double Jeopardy Clause. Furthermore, when the sentencing authority selects the initial sentence for the defendant from the range of sentences available, the defendant is impliedly acquitted of any greater sentence, even at a subsequent trial.

G. Prohibition Against All Increased Sentences Is the Only Protection Against the Appearance of Improper Motivation.

An increased sentence should not be allowed under any circumstances. To grant exception to this rule would permit the possibility of improperly motivated judges' increasing sentences to punish those seeking to correct errors in their former trials.

ARGUMENT

An Increased Sentence After Retrial When the Initial Conviction and Sentence Are Invalid Due to a Constitutional Error at the Original Trial Offends the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment.

A. Increased Sentence Affects Both Release and Parole.

A trial judge may increase a defendant's sentence following his conviction on retrial in either or both of two ways: (1) by increasing the length of the original sentence and/or (2) by denying defendant credit for time already served under the invalidated sentence. This denial of credit can affect both the actual release date and defendant's eligibility for parole.

An analysis of the second sentence of Clifton Pearce points up how a harsher sentence is accomplished. Pearce was originally tried and convicted of assault with intent to commit rape in May, 1961, after entering a plea of not guilty. He received a sentence of not less than twelve nor more than fifteen years. Pursuant to North Carolina's post-conviction procedures,[1] Pearce obtained a new trial on the ground that a constitutional error had been committed at his first trial—an involuntary confession had been admitted over his objection.[2]

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[1] N.C.G.S. 15-217–15-222.

[2] *State* v. *Pearce*, 266 N.C. 234, 145 S.E. 2d 918 (1965).

In June, 1966, Pearce was indicted for assault with intent to commit rape and retried. After pleading not guilty, he was found guilty of this offense and sentenced to eight years imprisonment.

For illustrative purposes only, assume Pearce had served his initial sentence continuously. With no time administratively credited to his sentence[3] and disregarding any periods when Pearce was released on bail awaiting retrial or appeal, he would have been eligible for release in May, 1973.[4] Based on the same assumptions, Pearce would have been eligible for release under his second sentence in June, 1974.

In sentencing Pearce after his second conviction, the trial judge stated:

> "It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the records available from the Prison Department that the defendant has served six years, six months, seventeen days, flat and gain time combined; and the Court, in passing sentence in this case, is taking into consideration the time

[3] Current policies of the North Carolina Department of Corrections permit pro rata accrual of up to 150 days of good conduct time per year, subject to forfeiture for misbehavior. Additional gain time may be earned in certain job classifications.

[4] N.C.G.S. 148-42. *Indeterminate sentences.*—The several judges of the superior court are authorized in their discretion in sentencing prisoners to imprisonment to commit the prisoner to the custody of the Commissioner of Correction for a minimum and maximum term. The maximum term imposed shall not exceed the limit otherwise prescribed by law for the offense of which the person is convicted. At any time after the prisoner has served the minimum term less earned allowances for good behavior, the Commissioner is authorized to discharge such person unconditionally or release him from confinement under conditions prescribed by the Commissioner.

> already served by the defendant. IT IS THE JUDGMENT of this Court that the defendant be confined to the State's Prison for a period of eight years." (A. 3)

In North Carolina the maximum punishment for assault with intent to commit rape is fifteen years.[5]

In voiding Pearce's second sentence, Judge Butler stated:

> "The eight-year sentence petitioner received at his second trial gives him more than full credit for time served on the maximum length of the original sentence, but it does not give full credit on the minimum length of the original sentence. *Patton* v. *Ross*, 267 F. Supp. 387 (E.D.N.C. 1967)." (A. 4, 5)

From the viewpoint of his actual release date, by obtaining a new trial Pearce subjected himself to the possibility of at least one additional year in prison; or, in effect, he was denied credit for one of the years he had spent in prison prior to his second conviction and sentence.

The effect of Pearce's second sentence on his eligibility for parole is even more severe. The applicable North Carolina statute provides that a prisoner shall be eligible for parole when he has served a fourth of his minimum sentence.[6] Under his first sentence, Pearce was eligible to be considered for parole after he had served a fourth of his

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[5] N.C.G.S. 14-22.

[6] N.C.G.S. 148-58. *Time of eligibility of prisoners to have cases considered.*—All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate; provided, that any prisoner serving sentence for life shall be eligible for such consideration when he has served ten years of his sentence.

minimum sentence of twelve years. This three-year period elapsed in May, 1964. Thus, Pearce was already eligible to be considered for parole when he obtained a new trial in 1965. Under his second sentence, Pearce would not have become eligible for parole until he had served a fourth of his second sentence. These two years would have been completed in June, 1968.

The North Carolina Board of Paroles construes the North Carolina Supreme Court decisions to mean that if a person is given a new trial and is resentenced, he will not be eligible for parole until he has served a fourth of this second sentence, unless the trial judge, in resentencing the defendant, states that credit for the time already served shall be given for the purposes of parole. (See Exhibit A, *infra* p. 33.) Since the trial judge supposedly gave Pearce credit for time already served in fixing his second sentence and did not mention credit for the purposes of parole, Pearce would have had again to serve the minimum period to become eligible for parole.

It should be noted that under the present policy of the North Carolina Board of Paroles, even a sentence which is not more severe in terms of the actual release date would be more severe in terms of eligibility for parole unless, in each instance, credit for parole purposes for all the time served under the invalid conviction was given at the time of the second sentence.

B. Traditional Theories Justifying Harsher Sentences.

In North Carolina and throughout the nation the imposition of harsher sentences has customarily been justified through the use of two theories, the "void" and the "waiver" doctrines. The "void" doctrine was developed to allow re-

view of criminal cases through habeas corpus. Both theories have been employed to prevent a defendant who has been erroneously convicted, from asserting the defense of double jeopardy as a bar to reprosecution after he had secured a reversal of his original conviction.[7] Even though these doctrines were originally used to provide a rationale for reprosecuting a defendant, the scope of their application has not been so limited and they have subsequently been used as a justification of increases in second sentences.[8]

Under the "void" doctrine, when the conviction at the first trial is overturned upon appeal or through other appropriate procedural methods, it is considered a nullity so that the sentence imposed at the first trial imposes no limitations upon the sentence which can be imposed at the second trial. The second sentencing court is therefore not obligated to consider any time served under the previous sentence in deciding on the penalty. The absurdity of using the "void" doctrine to justify an increased sentence is pointed out in *King* v. *United States,* 98 F.2d 291 (D.C. Cir. 1939):

> "The Government's brief suggests, in the vein of The Mikado, that because the first sentence was void, appellant 'has served no sentence but has merely spent time in the penitentiary': that since he should not have been in prison as he was, he was not imprisoned at all. The brief deduces the corollary that his nonexistent punishment cannot possibly be 'increased'. As to other corollaries, it might be suggested that he is liable in quasi-contract for the value of his board and

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[7] Whalen, *Re-sentence Without Credit for Time Served: Unequal Protection of the Laws,* 35 Minn. L. Rev. 239, 240-244 (1951).

[8] Note, 12 Vill. L. Rev. 380 (1967).

lodging and criminally liable for obtaining them by false pretenses." 98 F.2d at 293-294.

The doctrine of waiver permits the same result. In seeking post-conviction relief, the defendant is said to waive any benefit he might have received under the prior sentence, including the lighter sentence and credit for time served. When the defendant seeks a new trial, he waives all the consequences of the prior proceeding, accepting the hazards as well as the benefits of a new trial. *State* v. *White,* 262 N.C. 52, 136 S.E. 2d 205 (1964), *cert. denied,* 379 U.S. 1005 (1965). Underlying this fiction of waiver is a sporting theory of justice. If a petitioner gets a new trial, then the state gets a new chance to determine a proper sentence, even if the second sentence is greater than the first. The use of the theory of waiver to erase all the protection gained by a former trial and sentence was rejected by this Court in *Green* v. *United States,* 355 U.S. 184 (1957).

The North Carolina Supreme Court has also justified harsher sentences by holding a defendant "assumes the risk". The court holds that when a defendant appeals his conviction he takes the risk that a heavier sentence might be imposed. *State* v. *Williams,* 261 N.C. 172, 134 S.E. 2d 163 (1964). The court feels that if a defendant obtains a new trial of his own request in hopes of receiving a lighter sentence or even an acquittal, he accepted the hazard of receiving a heavier sentence and this is not a denial of his constitutional rights. *State* v. *White, supra.*

Recent North Carolina decisions discussing increased sentences have acknowledged the harshness of applying the above theories to resentencing procedures. In *State* v. *Weaver,* 264 N.C. 681, 142 S.E. 2d 633 (1965), the court

quotes from *Lewis* v. *Commonwealth,* 329 Mass. 445, 108 N.E. 2d 922 (1952), that: " . . . it is not even technically correct to say that the first sentence must now be deemed to have been a nullity. It was not a nullity when it was imposed or while it was being served . . . " 264 N.C. at 685, 142 S.E. 2d at 636.

In *Weaver,* the court held that on any subsequent sentence imposed for the same conduct, a defendant must be given full credit for all time served under the previous sentence. However, the benefit of such a rule is diminished in North Carolina, since the sentence itself can be increased, so long as the second sentence plus the time served under the initial erroneous sentence do not exceed the maximum statutory sentence allowable. Where the second sentence does not exceed such limitation, an allowance of credit by the trial judge is presumed. *State* v. *White, supra.* If the second sentence coupled with the time already served under the first sentence exceeds the statutory maximum, then the presumption that credit has been given is rebutted, and the sentence is invalid. *State* v. *Weaver, supra.* The requirement for an allowance of credit does not prevent the imposition of an increased sentence at the second trial.

C. Possibility of an Increased Sentence Is a Reality to Successful Petitioners.

The problem of harsher sentences is not simply theoretical. According to an informal survey recently published,[9] seventy percent of those defendants in North Carolina who were reconvicted and resentenced after successful post-conviction reviews were given harsher sentences. Of

[9] Note, 1965 Duke L.J. 395, 399 n. 25.

the fifty reconvicted and resentenced, forty-six had either identical or increased sentences. Thirty-two of these forty-six were not given full credit for the time served on the prior conviction. An identical sentence without full credit for time already served is a harsher sentence, since these "successful" petitioners could spend more time in prison than was possible under their original sentences.

A sentencing rule which provides the State with power to increase sentences and the application of which often results in harsher sentences raises the fear of a potential petitioner that he will be subjected to a more severe punishment simply because he has appealed or pursued his post-conviction remedies. With the possibility of an increased sentence, many petitioners have been deterred from exercising their right to petition for a new trial because of the fear of being punished for exercising that right.[10]

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[10] This fear is dramatically conveyed by a letter from a North Carolina prisoner to Judge Craven which is set out in *Patton* v. *North Carolina*, 256 F. Supp. 225 (W.D.N.C. 1967):

"Dear Sir:

"I am in the Mecklenburg County jail. Mr. _____ chose to retry me as I knew he would . . .

"Sir the other defendant in this case was set free after serving fifteen months of his sentence. I have served 34 months and now am to be tried again and with all probility [sic] I will receive a heavier sentence then [sic] before as you know sir my sentence at the first trile [sic] was 20 to 30 years. I know it is usuelly [sic] the courts prosedure [sic] to give a larger sentence when a new trile [sic] is granted I guess this is to discourage Petitioners.

"Your Honor, I don't want a new trile [sic] I am afraid of more time . . .

"Your Honor, I know you have tried to help and God knows I appreciate [sic] this but please sir don't let the state re-try me if there is any way you can prevent it." 256 F. Supp. at 231, n. 7.

There is some evidence that this repressive attitude exists nationwide. "The only hope for straightening things out is to give some Gideonite a new trial and reconvict him," said a Clerk of Court in Escambia County, Florida, "if we give him a heavier sentence than he got the first time, maybe that will serve as a lesson to others." *Time Magazine*, Oct. 18, 1963, p. 53. A trial judge in Delaware County, Pennsylvania, denying a defendant credit for over three years of time already served under an invalidated sentence said: "This is the risk these prisoners take when they seek to take advantage of new legal interpretations." Delaware County (Pa.) Daily News, March 25, 1965, § 2, p. 1.[11]

Pearce's second sentence was declared unconstitutional in an order (A. 4) based on the decision in *Patton* v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968). (Hereinafter sometimes referred to as *Patton*.)

In *Patton*, the defendant had been tried for armed robbery in October, 1960. He was unrepresented by counsel and entered a plea of nolo contendere at the close of the state's evidence. He was convicted, receiving a sentence of twenty years. Based on the denial of his constitutional right to counsel at the first trial, he was awarded a new trial which took place in February, 1965. Represented by counsel at his second trial, Patton pleaded not guilty and was convicted by the jury on the original indictment charging armed robbery. The trial court purported to give Patton credit for the nearly five years served on the original twenty years sentence, and then sentenced him to twenty

[11] *ABA Standards, Post-Conviction Remedies*, 95 (tent. draft, Jan. 1967).

years imprisonment. After the second trial, Patton applied to the federal district court for a writ of habeas corpus. This writ was granted in *Patton* v. *North Carolina,* 256 F. Supp. 225 (W.D.N.C. 1966). This decision was affirmed in the comprehensive opinion by Judge Sobeloff in *Patton* v. *North Carolina,* 381 F.2d 636 (4th Cir. 1967), *cert. denied,* 390 U.S. 905 (1968).

Patton was the first decision to examine thoroughly the constitutional objections to harsher sentences on retrial, finding that such were violative of three portions of the United States Constitution: the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment.

D. Due Process Is Offended by Restrictions Placed on Defendant's Access to Post-Conviction Relief.

In *Patton,* the court first recognized that the traditional justifications of increased sentences—the "void" and the "waiver" doctrines—were offensive to the Due Process Clause of the Fourteenth Amendment:

> "North Carolina deprives the accused of the constitutional right to a fair trial, then dares him to assert his right by threatening him with the risk of a longer sentence. It may not exact this price. The enjoyment of a benefit or protection provided by law cannot be conditioned upon the 'waiver' of a constitutional right." 381 F.2d at 640.

The court implicitly held that the harsher sentences possible under the North Carolina rule violated the "unconstitutional conditions" doctrine. Under this doctrine, a state may not condition the receipt of a state-provided benefit

upon the waiver or limitation of a constitutional right.[12] The benefit provided under this theory is the immunity from an increase in sentence. The constitutional right being limited or waived is the constitutional right to a fair trial which includes unfettered access to existing post-conviction remedies.

The doctrine of unconstitutional conditions is well established and should prevent the state from compelling a defendant to make a choice between increased sentence immunity and a fair trial. The doctrine has often been applied to situations where the state has offered to extend a benefit or has threatened punishment in exchange for the surrender of certain constitutional rights. If a person refused to surrender his constitutional rights, then the state would deny him the benefit accorded to others or inflict the threatened sanctions.[13]

As it applies to harsher sentencing, the orthodox unconstitutional conditions doctrine might be stated in reverse. The defendant must waive a state-conferred benefit, his immunity from an increased sentence, in order to secure his constitutional right to a fair trial by pursuing his post-conviction remedies. Whether stated in conventional or inverted terms, the violation of due process remains the same.

The benefit conferred by the State on Pearce was immunity from having his sentence increased. In North Caro-

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[12] Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595 (1960).

[13] *Spevack* v. *Klein,* 385 U.S. 511 (1967); *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *Griffin* v. *California,* 380 U.S. 609 (1965); *Sherbert* v. *Verner,* 374 U.S. 398 (1963). Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant,* 74 Yale L.J. 606, 614 (1965).

lina there can be no increase in the defendant's sentence after the term of the trial court has expired and the defendant has begun serving his sentence. *State* v. *Lawrence*, 264 N.C. 220, 141 S.E. 2d 264 (1965); *State* v. *McLamb*, 203 N.C. 442, 166 S.E. 507 (1932). Therefore, if Pearce had remained in jail and had not sought post-conviction relief, he would have been assured that his sentence would not be increased. He was guaranteed that the time he served would be credited in determining his release date and eligibility for parole.

To obtain this immunity from an increased sentence, a defendant must forego his right to seek a fair trial unblemished by constitutional defects. He is foreclosed from using the existing post-conviction avenues to correct any constitutional defects in his trial. To seek successfully post-conviction relief is to expose oneself to the possibility of a harsher sentence. This is analogous to both the "incredible dilemma" in *Green* v. *United States*, 355 U.S. 184 (1957), and the "grisly choice" in *Fay* v. *Noia*, 372 U.S. 391 (1963), both of which were denounced by the Court.

Freedom of access to post-conviction machinery for the purpose of correcting constitutional defects in a former trial is a fundamental part of the right to a fair trial. To impair a defendant's access to post-conviction remedies is in itself a violation of due process.

The right to a fair trial free of constitutional defects is a fundamental feature of the Due Process Clauses of the Fifth and Fourteenth Amendments which can only be secured if access to existing methods of review are unimpaired. The only justification for imposing a condition

upon the enjoyment of a state-provided benefit is where there is evidenced some compelling societal interest. Certainly restricting the correction of constitutionally defective trials is not in the public interest. "Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal." *People* v. *Henderson,* 60 Cal. 2d 482, 386 P.2d 677 (1963). The rationale is equally applicable to any method of post-conviction review.[14]

The fact that the right of appeal is guaranteed in North Carolina is affirmed in *State* v. *Stafford,* No. 495 (Fall Term 1968, Supreme Court of North Carolina, Dec. 9, 1968) 274 N.C. ——, —— S.E. 2d —— (1968):

> "In North Carolina, an aggrieved party has the absolute and unfettered right to appeal; and this Court has been alert to protect this right. In *State* v. *Arthur Patton, Jr.,* 221 N.C. 117, 19 S.E. 2d 142, the records disclosed that when a defendant gave notice of appeal from a fine of $35.00, the trial judge struck that judgment and imposed a prison sentence of ninety days. In remanding the case for resentence, Devin, J. (later C.J.), said: '[i]t seems here, under the circumstances described in the record, the action of the judge was induced by the defendant's expression of his intention to appeal. This tended to impose a penalty upon the defendant's right to appeal and to affect the exercise of his right to do so. . . . this right ought not to be denied or abridged; nor should the attempt to exercise the

[14] On the sufficiency of other possible justifications see Van Alstyne, *supra* at 617-623.

right impose upon the defendant an additional penalty or the enlargement of his sentence.'" 274 N.C. at ——.

The correction of constitutional defects through established post-conviction procedures in North Carolina should not be distinguished from a defendant's right of appeal. Both should be judiciously protected from abuse.

Once the state establishes procedures for post-conviction review, these procedures must be open and accessible to all. In *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966), the Court was concerned with a New Jersey statute which provided that a petitioner pay for a transcript of his trial court proceedings from his pay for his prison work. In finding that the statute violated the Equal Protection Clause, Justice Stewart reiterated this Court's concern with open access to post-conviction review:

> "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin* v. *Illinois,* 351 U.S. 12; *Douglas* v. *California,* 372 U.S. 353; *Lane* v. *Brown,* 372 U.S. 477; *Draper* v. *Washington,* 372 U.S. 487." 384 U.S. at 310.

As early as 1882, this Court articulated its concern with unfettered access to post-conviction remedies. *Kring* v. *Missouri,* 107 U.S. 221 (1882).

In *Griffin* v. *Illinois,* 351 U.S. 12 (1956), this Court held that a state may not grant appellate review in such a way as to discriminate against some convicted defendants be-

cause of their poverty and provided that the state must furnish a defendant with a free transcript on appeal.

In four cases, all decided on March 18, 1963, this Court amplified the constitutional requirement of unimpaired access to appellate and post-conviction relief. *Douglas* v. *California,* 372 U.S. 353 (1963), provided that the state must furnish counsel on appeal for indigent defendants. In *Lane* v. *Brown,* 372 U.S. 477 (1963), the right of indigent defendants to a free transcript and counsel on appeal was affirmed. *Draper* v. *Washington,* 372 U.S. 487 (1963), assured adequate appellate review for indigents by providing for an impartial method of obtaining free transcripts. In *Fay* v. *Noia, supra,* this Court provided for access to federal habeas corpus relief unencumbered by a restrictive interpretation of the requirement for exhaustion of state remedies.

Continuing interest in this problem is exhibited by the dissenting opinions of Justice Fortas in *United States* v. *Ewell,* 383 U.S. 116, 128-129 (1966), and *Cichos* v. *Indiana,* 385 U.S. 76, 80-82 (1966).

Other recent decisions examining this problem have held that such a practice unnecessarily restricts the defendant's right of review. *Marano* v. *United States,* 374 F.2d 583 (1st Cir. 1967). *Marano* relied on an earlier decision, *Worcester* v. *Commissioner,* 370 F.2d 713 (1st Cir. 1966), where the court held that a district judge was without power to offer the defendant a suspended sentence on condition that he not appeal. The court stated that the lower court could not

> "put a price on an appeal. The defendant's exercise or right to appeal must be free and unfettered . . .

> [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." 370 F.2d at 718.

The holding in *People* v. *Henderson, supra,* that an increased punishment is unconstitutional was based primarily on double jeopardy grounds, but the court noted that the right of appeal from an erroneous judgment is unreasonably impaired by the threat of harsher punishment.

The theory that harsher punishment impairs the right of appeal was the principal justification for the New Jersey Supreme Court's holding unconstitutional a sentence increased from life to death on retrial. *State* v. *Wolf,* 46 N.J. 301, 216 A.2d 586 (1966). The ruling was grounded on standards of procedural fairness which prohibited the infliction of a heavier sentence at retrial. These standards of procedural fairness did not permit the restriction of the right to appeal by requiring the defendant to barter with his wife for the opportunity of exercising his right to appeal.

The possibility of a harsher sentence for every defendant who successfully overturns his first conviction must necessarily chill his right to seek correction of constitutional defects in his first trial. Even though post-conviction procedures exist to secure a fair trial, the defendant may not choose to follow the procedures if he fears that he will be punished for doing so. Such a procedure, as it exists in North Carolina, violates not only the unconstitutional conditions doctrine but general concepts of due process. It is fundamentally unfair to establish procedures aimed at guaranteeing a trial free from constitutional defects, and then to restrict the use of such procedures by threatening a successful defendant with a more severe sentence.

This Court has not hesitated to protect the assertion of constitutional rights. In *United States* v. *Jackson*, 390 U.S. 570 (1968), the defendants were indicted under the Federal Kipnapping Act, 18 U.S.C. § 1201 (1965), under which a plea of guilty and waiver of jury trial assured the defendants that the death penalty would not be imposed. On the other hand, a plea of not guilty and the request for a jury trial could result in the imposition of the death penalty if the defendants were found guilty and the jury so recommended. Under this statutory scheme, the possibility of the death penalty existed only for those who contested their guilt before a jury. This was found unconstitutional since its effect was to "chill the assertion of constitutional rights by penalizing those who chose to exercise them." 390 U.S. at 581. In much the same manner, threat of a harsher sentence chills the assertion of a defendant's right to a fair trial by effectively denying him access to post-conviction remedies.

E. Arbitrary Classification of Persons Exposed to Harsher Sentences Denies Equal Protection.

Under the Equal Protection Clause, arbitrary classifications by states in the application of their laws are prohibited. Treatment among different classes of defendants can be different, but the distinction made between these classes must rest on a rational foundation. *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griffin* v. *Illinois*, *supra*; *Truax* v. *Raich*, 239 U.S. 33 (1915). As stated previously, in North Carolina there can be no increase in a defendant's sentence after the term of the trial court has expired and the defendant has begun serving his sentence. *State* v. *Lawrence*, *supra*. Even so, North Carolina may not be pro-

hibited under the Equal Protection Clause from establishing a system of sentence review which might include the upward revision of sentences. However, North Carolina has enacted no legislation providing for sentence review, which shows that the legislature has not considered a review of sentences to be of compelling state interest. *Gainey v. Turner*, 266 F. Supp. 95 (E.D.N.C. 1967).

Since a sentence cannot be increased after a defendant has commenced to serve it and there is no legislative provision for the modification of sentences, the risk of a harsher sentence falls on only one class of defendants, those who successfully seek appellate or post-conviction relief. The state should not be allowed arbitrarily to expose only those who have previously been subjected to an erroneous conviction to the risk of a harsher sentence.

The only justification for an increase in a sentence is that the original sentence was too light, either because the first judgment was too lenient or because new facts have been presented. However, in North Carolina the only class of persons who are vulnerable to this argument are those who have exercised their right to challenge their convictions. There is no reason to suppose that there exists any rational relationship between this group and those prisoners who indeed might deserve an increased sentence. There is no evidence that these successful petitioners for a new trial were treated any more leniently at the initial trial than prisoners who chose not to assert their right to a new trial or had no grounds to do so.

The only distinctive feature of the class subjected to the risk of harsher punishment is not the fact that they alone might have originally received too light a sentence,

but that they were originally denied a fair trial. This is certainly no justification for treating them more harshly.

The Equal Protection Clause is further offended by unfair discrimination in the class of persons who might pursue their post-conviction remedies. A harsher sentence on retrial will not, in North Carolina, deter those who have received the statutory maximum at their first trial, since their sentences cannot be increased. *State* v. *Weaver, supra.* Also, those defendants convicted of minor crimes will be more inclined to seek post-conviction review than those convicted of major crimes because trial judges have broader sentencing discretion in the latter. Finally, the prisoners who have served the most time on their initial sentence will be deterred from seeking post-conviction review since they have the most to lose by a denial of credit for time already served.[15]

The State's brief argues that there is no arbitrary classification within the class which seeks to appeal since all defendants exercising their right to appeal are subject to a potentially harsher sentence and all stand on equal footing in their separate appeals. This argument can be effectively countered by this Court's discussion in *Rinaldi* v. *Yeager, supra*:

> "The Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes. *McLaughlin* v. *Florida,* 379 U.S. 184, 189-190. It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, that constitutional demand is not a demand that a statute necessarily apply equally to all persons.

[15] Note, 80 Harv. L. Rev. 891 (1967).

> 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' *Tigner* v. *Texas*, 310 U.S. 141. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" 384 U.S. at 308-309 (citations omitted).

It is noted that in the present situation the class is defined not by legislation but by judicial decisions. However, the requirement still exists that the distinctions have some relevance to the purposes for which the classification is made. As pointed out above, the distinction that a defendant initially received an unfair trial does not justify the threat of a harsher sentence.

F. Double Jeopardy Protections Against Multiple Punishments and Reprosecution After Acquittal Are Violated by Increased Sentences.

It is recognized that this Court has not yet explicitly held that the Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. See *Palko* v. *Connecticut*, 302 U.S. 319 (1937). In *Patton*, the court, relying on the reasoning in *United States ex rel. Hentenyi* v. *Wilkins*, 348 F.2d 844 (2nd Cir. 1965), *cert. denied sub nom. Mancusi* v. *Hetenyi*, 383 U.S. 913 (1966), concluded that the Double Jeopardy Clause is applicable to the states because the basic core of the double jeopardy guarantees are as fundamental as those other guarantees of the Bill of Rights

which have been absorbed into the Due Process Clause of the Fourteenth Amendment by this Court. Moreover, this precise issue is before the Court in *Benton* v. *Maryland* (No. 201 October Term, 1968), argued December 12, 1968. A decision dealing with the merits of the issue in that case would necessarily be controlling on that issue in this case.

Assuming the Double Jeopardy Clause is applicable to the states, two interpretations of the Double Jeopardy Clause lend support to the fact that harsher sentences cannot be imposed by the states.

Since 1872, the Double Jeopardy Clause has been interpreted to prohibit multiple punishments for the same offense. In *Ex parte Lange,* 85 U.S. (18 Wall.) 163 (1873), the accused was given a sentence of imprisonment and fined. The defendant paid the fine before it was discovered that the statute provided for either imprisonment or fine, not both. Since the defendant had already paid the fine, this Court held that he was to be released immediately from prison since no man can be twice lawfully punished for the same offense.

This prohibition against multiple punishments was affirmed in *United States* v. *Benz,* 282 U.S. 304 (1931), where defendant's ten months' sentence was reduced to six months. This Court upheld the reduction but noted in a dictum statement that the sentencing court would have been powerless to increase the sentence since to do so would have subjected the defendant to double punishment for the same offense, a violation of the Double Jeopardy Clause. See *United States* v. *Adams,* 362 F.2d 210 (6th Cir. 1966) and *United States* v. *Sacco,* 367 F.2d 368 (2nd Cir. 1966).

In each of the above cases, the proposed sentence increase took place after the defendant had commenced to

serve his sentence and did not involve a new trial and a resentence. However, as stated in *Patton*, there should be no constitutionally significant distinction between the increases prohibited in those cases and increases in punishment following retrial. It should not matter whether the second sentence was imposed because of an error committed by the sentencing judge resulting simply in a resentence or because of an error committed in the trial resulting in a reversal and a new trial. This prohibition against multiple punishments provided by the Double Jeopardy Clause is applicable to defendants such as Pearce unless he is considered to have waived this double jeopardy protection. As stated in *Patton* v. *North Carolina, supra,* at 645-646, such a waiver is completely unrealistic and offends due process.

The second protection of the Double Jeopardy Clause applicable to Pearce is the protection from reprosecution after an acquittal. In *Green* v. *United States, supra,* the defendant was tried on an indictment charging murder. He was found guilty of second degree murder and sentenced to a term of imprisonment. The jury verdict was silent as to first degree murder. On appeal the second degree murder conviction was reversed. The defendant was retried on the same indictment, the verdict being first degree murder. Green was sentenced to death.

This Court in reversing, held the conviction violated the double jeopardy protection against reprosecution after acquittal. The Court decided the initial conviction for second degree murder was an implied acquittal of any higher degree of the same crime (first degree murder). Green could have lawfully been reprosecuted for second degree murder, but no higher degree of that crime.

The government argued that the defendant had waived his right to protection against double jeopardy by pursuing appellate relief. However, the Court rejected this argument and pointed out that the defendant had no meaningful choice:

> "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." 355 U.S. at 192.

The rejection of the waiver argument in this factual situation is equally applicable to the rejection of the waiver argument in all situations involving harsher sentencing.

Applied to the facts in the instant case, the "implied acquittal" doctrine should be extended to hold that a defendant is impliedly acquitted of any sentence greater than the sentence he received at his first trial.[16] This "implied acquittal" theory was applied in *People* v. *Henderson, supra,* to overturn a harsher sentence (death) received by a defendant who had successfully challenged his first conviction and sentence of life imprisonment. The theory of *Henderson* has been followed in later California cases to restrict the imposition of harsher prison sentences at a second trial. *People* v. *Ali,* 57 Cal. Rptr. 348, 424 P.2d 932 (1967); *In re Ferguson,* 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965).

The State has relied heavily upon two former decisions of this Court, which seem on their face to uphold a harsher sentence on retrial. However, the decision in both cases can be distinguished from the situation in the instant case.

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[16] Van Alstyne, *supra* at 635.

In *Murphy* v. *Massachusetts*, 177 U.S. 155 (1900), the defendant was sentenced under the Massachusetts indeterminate sentence statute to a term of not less than ten and no more than fifteen years. The statute creating indeterminate sentences had been passed after the commission of the offense for which the defendant was tried. On motion of the defendant, the sentence was reversed upon the grounds that the statute authorizing such indeterminate sentences should not relate to past offense. The defendant was not retried, but merely resentenced to a specific term of twelve years, six months, with the time he had already served being credited to this sentence; leaving a total sentence in excess of nine years to be served. Under his first sentence the defendant could have been released in 1906. Under the second sentence, his release would not have occurred until 1908.

Even though Murphy's second sentence was harsher, this fact did not form the basis of the double jeopardy argument which was made. Murphy contended that to resentence him at all after he had commenced serving his first sentence was a violation of the prohibition against double jeopardy. Even though the factual situations are analogous, *Murphy* should not be viewed as precedent for allowing harsher sentences, since this case merely stood for the fact that Murphy could be resentenced even though he had commenced serving his initial sentence. This Court held that plea of former jeopardy or former conviction cannot be maintained because of service of part of the sentence reversed or vacated on the prisoner's own application.

In *Stroud* v. *United States*, 251 U.S. 15 (1919), defendant was convicted of murder in the first degree in May, 1916, and was sentenced to death. This was reversed and

he was tried again in May, 1917, and sentenced to life imprisonment. This sentence was reversed and in a third trial, Stroud was found guilty of murder in the first degree and sentenced to death. Stroud argued that the last trial of the case had, in effect, put him in double jeopardy. This Court, in upholding the death sentence, stated the defendant had not been placed in double jeopardy within the meaning of the Constitution, since the defendant himself had invoked the action of the court which resulted in a new trial. In *Stroud,* the defendant was also arguing that the Double Jeopardy Clause prevented reprosecution. A close reading of this decision does not indicate that any of the arguments against harsher sentencing were made to the Court.

Both *Murphy* and *Stroud* stand only for the long accepted principle that the Double Jeopardy Clause does not absolutely prohibit reprosecution. *United States* v. *Ball,* 163 U.S. 662 (1896). The problems and constitutional issues raised by this case were not raised in either *Murphy* or *Stroud,* and these decisions should not be binding on this question. When comparable arguments were raised in *Green,* this Court held that double jeopardy was applicable and a defendant should not have to waive a constitutional right in order to correct an erroneous conviction.

G. Prohibition Against All Increased Sentences Is the Only Protection Against the Appearance of Improper Motivation.

The State has argued that the flat rule in *Patton* prohibiting all harsher sentences should be tempered with the exception that such harsher sentences would be allowed if justified. Even with such an exception, no justification

exists for the harsher sentence received by Pearce. The North Carolina Supreme Court acknowledged that the evidence at his second trial was essentially the same as the evidence presented at his first. *State* v. *Pearce*, 268 N.C. 707, 151 S.E. 2d 571 (1966).

To allow an increased sentence to be justified would necessitate a factual inquiry in every case to determine the motivation of the judge or jury who imposed the second sentence. A judge motivated by a desire to punish the defendant and deter such appeals could not be expected to announce it. If harsher sentences could be justified, then improper motivation would be possible. It is not contended that every harsher sentence is the product of an improper motivation, but the problem which exists under a rule allowing harsher sentences is well stated in *Patton*:

> "It is equally impossible and more distasteful, for federal courts to pry into the sentencing judge's motivation to ascertain whether vindictiveness play a part . . . [I]mproper motivation is characteristically a force of low visibility. In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate punishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherited in a system permitting stiffer sentences on retrial—that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. Even the *appearance* of improper motivation is a disservice to the administration of justice." (Emphasis the Court's) 381 F.2d at 641.

The effect of this policy is to place a ceiling on resentencing. The original sentence will act as a maximum limi-

tation on any sentence that may subsequently be given at a new trial. In this way, the defendant is free to appeal or to pursue his post-conviction remedies without fear of having a harsher punishment imposed if he is successful in attacking his original conviction. This rule already exists in the United States Military, Uniform Code of Military Justice, 10 U.S.C. § 863 (1965), and has been proposed by the ABA Advisory Committee on Sentencing and Review in *ABA Standards, Post-Conviction Remedies*, § 6.3 (tent. draft, Jan., 1967),[17] and *ABA Standards, Sentencing Alternatives and Procedures*, § 3.8 (tent. draft, Dec., 1967).[18]

The rule against increased sentences has also been adopted in comprehensive opinions by the Oregon and Minnesota Supreme Courts. *State* v. *Turner*, 429 P. 2d 565 (Ore. 1967) and *State* v. *Holmes*, 161 N.W. 2d 650 (Minn. 1968).

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[17] § 6.3 Sentence on reprosecution of successful applicants; credit for time served.

(a) Where prosecution is initiated or resumed against an applicant who has successfully sought post-conviction relief and a conviction is obtained, or where a sentence has been set aside as the result of a successful application for post-conviction relief and the defendant is to be resentenced, the sentencing court should not be empowered to impose a more severe penalty than that originally imposed.

(b) Credit should be given towards service of the minimum and maximum term of any new prison sentence for time served under a sentence which has been successfully challenged in a post-conviction proceeding.

[18] § 3.8 Resentences.

Where a conviction or sentence has been set aside on direct or collateral attack, the legislature should prohibit a new sentence for the same offense or a different offense based on the same conduct which is more severe than the prior sentence less time already served.

Conclusion

Based on the foregoing reasons, an increased sentence denies both due process and equal protection as guaranteed by the Fourteenth Amendment and violates the Double Jeopardy Clause of the Fifth Amendment. Consequently, the Judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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EXHIBIT A

State of North Carolina
Office of The Board of Paroles

831 West Morgan Street
Raleigh 27602

December 16, 1968

Mr. Larry B. Sitton
Attorney at Law
Greensboro, North Carolina

Re: Pearce v. North Carolina

Dear Mr. Sitton:

I am pleased to reply to your letter of December 12, 1968, regarding eligibility for parole consideration.

Assuming that the original sentence of a defendant has been set aside as a result of a successful application for post conviction relief and the defendant is resentenced, the defendant is not given credit for the time served under the invalid sentence for the purpose of parole consideration, unless ordered by the sentencing court, and therefore must serve the minimum period required under law before becoming eligible for parole consideration.

The above is the established rule and policy of the Board of Paroles established in accord with the statutes creating this Board and the statusof court decisions at this time.

Very truly yours,

Marvin R. Wooten

MRW/nw